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IN THE

Supreme Court of the United States

October Term, 1949

No. 561

STANDARD COMMERCIAL TOBACCO COMPANY and
STANDARD COMMERCIAL STEAMSHIP CORP.,
Petitioners,

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, and
UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and Brief in Support Thereof.

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Petitioners,

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, and
UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to Review a Judgment Affirming the Dismissal of the Complaints in Intervention of Petitioners by the United States District Court for the District of Columbia, and Brief in Support Thereof.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Standard Commercial Tobacco Company and Standard Commercial Steamship Corp., both Delaware corporations, intervening plaintiffs in the United States District Court for the District of Columbia, and appellants in the United States Court of Appeals for the District of Columbia Circuit, respectfully pray that a writ of certiorari issue to review a judgment of the said United States Court of Appeals for the District of Columbia Circuit, entered in

this cause on June 13, 1949, affirming a judgment of the United States District Court for the District of Columbia dismissing the intervening complaints of petitioners.

OPINION AND JUDGMENT BELOW.

Neither the opinion of the United States District Court for the District of Columbia nor the opinion of the United States Court of Appeals for the District of Columbia Circuit is reported. They appear in the record.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was rendered June 13, 1949. A petition for rehearing was denied September 28, 1949. This Court has jurisdiction by virtue of the provisions of Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED.

The questions involved are:

1. Whether a breach of trust is a tort within the meaning of the Federal Tort Claims Act of 1946, 60 Stat. 842, 843, 844.

2. Whether the United States is liable as a trustee to see to the application of money and property of Germany and German nationals coming into its hands as trustee to the discharge of obligations of its trust.

3. Whether the United States, because of its sovereignty, is exempt from the established rules of law which impose the duties of trustees upon those who become possessed of property which in equity and good conscience belongs to others.

4. Scope of the liability of the United States as constructive trustee to apply property and money of Germany and German nationals coming into its possession and ownership to the performance of its expressly assumed obligation to enforce and collect for American nationals damages for their private war losses.

5. Extent of liability of United States for failure of its officers, agencies, and employees to perform their fiduciary duties.

6. Whether any moneys and properties of Germany and German nationals coming at any time into possession and ownership of the United States became impressed with a trust in favor of petitioners and others similarly situated.

7. Whether petitioners' intervening complaints state facts sufficient to entitle them to a trial on the merits.

REASONS FOR GRANTING WRIT.

1. This case is one of novel impression. On no prior occasion has this Court been called upon to decide whether a breach of trust is a tort within the meaning of the Federal Tort Claims Act.

2. Research indicates that there is no opinion of this Court containing a comprehensive and conclusive definition of a tort, similar to that of Judge Finch of the Court of Appeals of New York in *Rich* v. *New York Central Railroad*, 87 N. Y. 382.

3. Clarification and interpretation of the Federal Tort Claims Act of 1946 with respect to violations of official duties by Government officials are instantly needed.

4. A declaration by this Court of the scope and extent of the Federal Tort Claims Act of 1946, according to the intent and meaning of Congress is necessary and unavoidable.

5. An interpretation and clarification of the meaning of the provisions of the War Claims Act of 1928 (45 Stat. 254) must eventually come from this court, as long as over $100,000,000 is due to American nationals under the provisions of this act.

6. The decisions of the courts below limit and circumscribe the Federal Tort Claims Act, contrary to the opinion of this Court in the case of *Brooks* v. *United States,* decided May 16, 1949 (93 L. ed. 884, 885, Advance Sheets), where this Court said "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States."; and more recently in the *Insurance Companies* Cases, decided on December 12, 1949 (94 L. ed. 151).

STATEMENT OF THE CASE.

The complaint in intervention of Standard Commercial Tobacco Company alleges that the corporation is the holder of an award of the Mixed Claims Commission, United States and Germany, in the amount of $450,000.00, with interest at 5 per cent from November 11, 1918, on which there was due and owing as of October 22, 1941, on account of principal a balance of $146,220.99, and unpaid interest of $147,663.73, a total of $293,884.72, with further accruals of interest since that date.

The complaint in intervention of Standard Commercial Steamship Corp., alleges that the corporation is the holder of an award of the Mixed Claims Commission, United States and Germany, in the amount of $89,294.00, with interest at 5 per cent from November 11, 1918, on which there was due and owing as of October 20, 1941, on account of principal a balance of $7,921.02 and interest of $12,390.86, a total of $20,311.88, with further accruals of interest since that date.

Each of the intervening complaints alleges:

(1) That defendant Snyder is sued in his capacity as Secretary of the Treasury.

(2) The United States is sued pursuant to the provisions of the Federal Tort Claims Act of August 2, 1946 (60 Stat. 842, 843, 844).

(3) The United States entered into an agreement with Germany, approved June 5, 1930, under which Germany agreed to pay in full all awards of the Mixed Claims Commission, United States and Germany

(4) To secure the payment of said awards, Germany deposited with the Secretary of the Treasury gold bonds of the German government of the face and dollar value of more than $500,000,000, and agreed to discharge such bonds in semi-annual payments until the United States received an amount sufficient to pay in full all awards of the Mixed Claims Commission, United States and Germany.

(5) About 1931, without the knowledge, consent or approval of the intervening plaintiffs or any other award-holder of the Mixed Claims Commission, United States and Germany, the United States relieved the German Government of its agreement to make payments on the gold bonds referred to above, and no payments have since been made thereon by Germany.

(6) After enactment of the Settlement of War Claims Act of 1928 and execution of the Debt Funding Agreement, the Secretary of the Treasury, in carrying out the terms of the Settlement of War Claims Act, applied certain German enemy money and property then in possession of the Alien Property Custodian of the United States, which were intended for the benefit of these appellants and others similarly situated, to provide payments to German nationals formerly enemy aliens, and issued to the Alien

Property Custodian his certificate of indebtedness in the sum of $56,000,000, a copy of which certificate of indebtedness is appended to the complaints in intervention as Exhibit A.

(7) By the Harrison Resolution of June 27, 1934 (48 Stat. 1267), the Congress suspended and superseded the authority of the Secretary of the Treasury to make further payments to German nationals under the Settlement of War Claims Act.

(8) Since enactment of the Harrison Resolution there remained and then were in the custody and possession of the Secretary of the Treasury cash and securities in excess of $10,000,000 in special accounts, including the German Special Deposit Account, available for payment on awards of said Mixed Claims Commission, United States and Germany.

(9) As a result of war between the United States and Germany, declared December 7, 1941, the United States has become possessed of, owns, and now has large amounts of gold, currency, securities, and other properties derived from Germany and German Nationals in excess of $500,000,000.

(10) The United States has made no effort to apply any of the money or property of Germany and its nationals in its ownership and possession to the payment of the bonds of the German government mentioned above, which have been in default since 1931, or to apply any of such money or property to the payment of the certificate of indebtedness referred to above.

(11) Other than plaintiff, the intervening plaintiffs, and others similarly situated, no one else has or claims to have any right to any part of such money and property.

(12) Upon the United States becoming vested with money and property formerly belonging to Germany and German nationals, and having assumed a position of trust

for the benefit of petitioners and others similarly situated, such money and property became and still are impressed with a trust in favor of petitioners and others similarly situated.

(13) By virtue of the Settlement of War Claims Act, the United States claims no interest, except as trustee, in the German Special Deposit Account or the German gold bonds referred to or the proceeds thereof, because they were delivered to the defendants for the sole and exclusive benefit of holders of awards of the Mixed Claims Commission, United States and Germany.

(14) Following the declaration of war with Germany in 1941, it became and still is the duty of the United States to apply to the payment of the German gold bonds heretofore mentioned and in satisfaction of said certificate of indebtedness, property and money of Germany and German nationals, which came into possession and ownership of the United States in sufficient amounts to pay the balances due on the awards of petitioners and others similarly situated; and, since such money and property became and still are impressed with a trust in favor of appellants and others similarly situated, the failure of the appellees to so apply them constitutes a breach of trust and makes them guilty of a wrongful act and omission of duty within the meaning of the Federal Tort Claims Act, and tantamount to conversion, if attributable to private persons.

(15) As a result of the omission and neglect of duty by respondents, as aforesaid, petitioners and others similarly situated have been and are injured in their property rights and have suffered losses within the meaning of the Federal Tort Claims Act equal to the unpaid balances due on their awards of the Mixed Claims Commission, United States and Germany.

(16) On information and belief, petitioners allege that there are due on awards of the Mixed Claims Commission, United States and Germany, more than $110,000,000.

(17) Demand was made by the original plaintiff February 6, 1947, upon the respondents for payment of her award, and also a demand that respondent Snyder pay to the Alien Property Custodian or his successor, the amount due on his certificate above referred to, such payment to be made out of money and property of the German government and German nationals under his control or in his possession, but he has refused to honor such demand, and a like demand by petitioners would be futile, and the law does not require a useless act.

(18) All moneys in the German Special Deposit account and the aforesaid German gold bonds, by virtue of the treaty and agreement between the United States and Germany, were received in express trust for the benefit of petitioners and others similarly situated.

(19) Because there are funds and property in possession of the respondents or under their control for payment of the awards of petitioners and others similarly situated, it is the ministerial duty of respondent Snyder to make such payments.

Appropriate prayers for relief were included in each of the complaints in intervention.

The claims of petitioners arose out of losses sustained by them during World War I, and are adjudicated claims based on awards of the Mixed Claims Commission, United States and Germany.

Since the bringing of this proceeding, the Government has paid from the German Special Deposit Account the sum of about $11,000,000 on awards of the Mixed Claims Commission, United States and Germany, equivalent to about ten per cent of the amounts due on awards of said Commission, under the Act of August 6, 1947 (Public Law No. 375, 80th Congress).

Wherefore, petitioners pray the allowance of a writ of certiorari to the United States Court of Appeals for the

District of Columbia Circuit in this cause, there entitled *Katharine M. Drier, Standard Commercial Tobacco Company and Standard Commercial Steamship Corp., Appellants,* v. *John W. Snyder, Secretary of the Treasury, and United States of America, Appellees,* No. 9902; that said cause may be reviewed and determined in this Court; and that the judgment of the United States Court of Appeals for the District of Columbia Circuit may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

STANDARD COMMERCIAL
TOBACCO COMPANY

By RICHARD L. MERRICK
Of Counsel for Petitioners

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States District Court for the District of Columbia is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet officially reported. It appears in the Record.

JURISDICTION.

The jurisdictional Statement contained in the Petition for Writ of Certiorari is adopted, and is not set forth herein.

QUESTIONS PRESENTED, ERRORS URGED, ETC.

The questions presented, reasons for granting the writ, and Statement of the Case are set forth in the foregoing petition, and the request is respectfully made that reference thereto be made and that they be considered as having been incorporated herein.

ARGUMENT.

By their motion to dismiss the complaints in intervention, the respondents, for the purposes of this appeal, admit the truth of all facts well pleaded. The trial court held (1) that the Federal Tort Claims Act does not apply to this case, either in terms or construction, and (2) that "any purported claim of liability is specifically negatived by the provisions of the War Claims Act of 1928 (45 Stat. 254)" which provides that "nothing in this section shall be construed as the assumption of liability by the United States for payment of the awards * * *". The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the trial Court. Both courts missed entirely the vital and controlling questions involved and the theory of these petitioners. There was no assump-

tion of liability by the United States under the War Claims Act of 1928 and none was contended for or urged by petitioners. No request was made by petitioners that the awards to them be paid out of money or property originally belonging to the United States, but only from money and property coming into its hands from Germany and German nationals, as to which the United States was a trustee only, with the obligation and duty to apply such property and money to the payment of all awards of the Mixed Claims Commission, United States and Germany.

There really is only one pertinent inquiry, namely; are sufficient facts alleged in the complaints in intervention to put defendants to proof.

An analysis of the complaints in intervention discloses that allegations of fact are set forth therein, showing that the acts complained of occurred and the money and property involved are within the jurisdiction of the trial court; that appellants are holders of awards of the Mixed Claims Commission, United States and Germany, on which substantial sums of money are long overdue and unpaid; that the United States, for and on behalf of petitioners and others similarly situated, entered into an agreement with Germany by which the latter was "to pay in full all awards" of the Mixed Claims Commission, United States and Germany, and by the Debt Funding Agreement of June 5, 1930, Germany agreed to pay all awards in full, and, to secure such payment, deposited with the Secretary of the Treasury gold bonds of the face value of more than a half billion dollars, at the same time agreeing to discharge the bonds in semi-annual payments until the full amount of the awards of the Mixed Claims Commission were paid in full.

Having pleaded the awards and agreements aforementioned, the complaints in intervention, in paragraph 8, allege that about 1931, the United States, without the knowledge, consent or approval of petitioners for whose benefit the agreements and awards were made, relieved Germany

of its agreement to make further payments on the bonds, and no payments since have been made thereon.

Those allegations clearly show the assumption by the United States of the performance of a duty to petitioners, the partial discharge thereof, and a violation of such duty by the United States, resulting in serious detriment to petitioners in the way of lost payments on their awards.

In Paragraph 9 of the complaints in intervention, a wrongful diversion of funds by the Secretary of the Treasury from petitioners to German nationals is clearly alleged, as well as the giving by the Secretary of the Treasury of a certificate of indebtedness in the amount of $56,000,000 therefor. A copy of the certificate is annexed to each of the complaints in intervention and should appear in the Record.

In paragraphs 10 and 11 of the complaints in intervention, allegations of fact are set forth showing that the Congress stopped the Secretary of the Treasury from making further payments to German nationals, and that the acts of the Secretary of the Treasury were wrongful. Those wrongful acts resulted in great detriment and loss to these appellants, and they ought to be able to recover therefor.

In paragraph 12 of the complaints in intervention facts are alleged showing that since December, 1941, the United States has become possessed of and has large amounts of gold, currency, securities, and other properties, which it seized from Germany, and German Nationals; and in paragraph 13 allegations are made that no effort has been made by the United States to apply any of such money or property to the liquidation of the German bonds still in its possession, which have been in default since 1931, or to apply any of such money and property to the liquidation of the certificates of indebtedness referred to above, despite the fact that there exists no rights or claims of right to such money and property except that of these petitioners and others similarly situated.

In paragraph 14 specific allegations are made that no one, other than petitioners and others similarly situated, has or claims to have any right to any part of said money and property.

In paragraph 15 allegations are made that the United States assumed a position of trust for the benefit of petitioners, and that the money and property in question became and still are impressed with a trust in favor of appellants.

These are all allegations of facts or ultimate facts in the way of factual conclusions, requiring the production of evidence on the part of the United States to meet or disprove them.

The pleading of ultimate facts and factual conclusions is proper. In fact, to plead in extenso evidentiary matters is wholly improper. A short and plain statement of the plaintiff's claim is all that is required.

Rule 8 (a)(2), Federal Rules of Civil Procedure.

FEDERAL TORT CLAIMS ACT APPLIES.

The allegations of the complaints in intervention clearly establish the existence of a duty on the part of the United States to collect the German bonds and apply the proceeds to the liquidation of the awards of the Mixed Claims Commission, United States and Germany. Under its agreement with Germany, the United States became a trustee, charged with a specific duty to hold the bonds, collect the payments thereon, and pay the collections to awardholders of the Commission.

The United States entered upon the performance of that trust, but violated it in 1931, by relieving the German government of the obligation to make further payments on the bonds. The complaints in intervention further show that the United States, as trustee, violated its duty and obligation to appellants, to their damage in the amounts of their unpaid awards.

In the cases of the *United States of America* v. *Aetna Casualty and Surety Company*, decided December 12, 1949, 94 L. ed. 151 Advance Sheets, this Court stated:

> "* * * the language of the Act indicates a congressional purpose that the United States be treated as if it were a private person in respect of torts committed by its employees, except for certain specific exceptions enumerated in the Act * * *", and
>
> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. Hayes Construction Co., 243 N. Y. 140, 147: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"

In lieu of a more formal brief, we attach hereto a memorandum prepared by Harold G. Aron, Esquire, and ask that this Court consider the same a part hereof.

CONCLUSION.

We respectfully contend that the writ of certiorari for the review of the proceedings below should be granted and that this case should be heard and decided in this Court.

Respectfully submitted,

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October 4, 1949

MEMORANDUM to Mr. Merrick.

Re: Petition for Writ of Certiorari.

Point I. The case is one of novel impression; certainly on no prior occasion has the Supreme Court of the United States been called upon to decide that a *breach of trust* is a tort under the Federal Tort Claims Act of 1946.

Point II. To the best of counsel's knowledge, the Supreme Court has not had occasion to sanction the enforcement of its repeated opinions that the United States can be held to the responsibilities and duties of an express or constructive trustee.

Point III. The Supreme Court has yet, for the first time, since Chief Justice Marshall's opinion (1824) in *Bank of the United States* v. *Planters Bank of Georgia,* 9 Wheaton 904, 6 L. Ed. 244, (See also, as to Marshall's views, Senate Doc. 102, 19th Cong., 1st Sess., Vol. 5, pp. 470, 471), to pass on the question whether, because of its sovereignty, the United States is exempt from the established rules of law and equity which, *in invitum,* impose, *inter alia,* constructive trusts on those who become possessed, legally, rightfully, or wrongfully, of property which in equity and good conscience belongs to others.

Point IV. On the admitted facts (as this petition brings up a dismissal of the complaint on bare motion, without denial of the facts or the introduction of any testimony, evidence or proof) the decision below is in direct conflict with the recent decision of the Supreme Court in *Brooks v. United States,* decided May 16, 1949. The appeal herein was argued below on April 15 and decided June 13, 1949, before the Brooks decision was officially reported. The opinion of the Supreme Court in the Brooks case supported the learned dissenting opinion of Judge Parker in the Circuit Court of Appeals, Fourth Circuit, 169 Fed. 2d, 848, where it was pointed out that "where express exceptions are made, the legal presumption is that the legis-

lature did not intend to save other cases from the operation of the statute." This case falls within none of the many exceptions enumerated in the Federal Tort Claims Act, but the courts below have in this, as in other respects, disregarded all rules of statutory construction, without a word of explanation for their action.

Point V. Since 1875, there has been no decision of the Supreme Court as to the extent of the liability of the United States under express and implied trusts assumed by it or imposed upon it by operation of law. Vast have been the changes during that interval in the political and economic concepts and relations of the government and its citizens.

Point VI. Since the decision in *DeBode* v. *The Queen*, 3 Clarke's House of Lords, 464 (1751), cited by the Court of Claims in the Gray case, (21 Ct. Clms., 340; See also 22 Ct. Clms. 724), there has been much written in judicial opinions that is conflicting and confused as to the relation of the sovereign in the prosecution of private war losses resulting to its citizens and nationals—going the whole way from the academic discussion contained in the government's brief below seeking to show that "the state has full discretion to determine whether or not it will press any claim against State A" to the firmer statement of sound principles in the DeBode case, where Lord Truro said: "It is the admitted law that * * * if the subject of a country is spoliated by a foreign Government, he is entitled to redress through the means of his own Government. But if from weakness, timidity, or any cause on the part of his own Government no redress is obtained from the foreign power, then he has a claim against his own country." There are amazing similarities and most trenchant dicta in the DeBode case, decided by the House of Lords in 1751, reported in the Reprint, Vol. 10, at page 176. A reading of that report, the language of the Lord Chancellor and the arguments of counsel and the Crown's attorney general, more than underline our assertions that

this, too, is an historic case and should not be waved aside without opinion on a motion to dismiss. In the DeBode case, there will be found this argument of counsel for the appellant: "A subject of the realm may become entitled to sue the Crown for compensation on a convention * * *. This is a convention of indemnity (to indemnify by the French Government British Nationals who have suffered injuries in the French Revolution). If the indemnity has been made by the Crown less than it ought to be, then the subject has, on petition of right, a claim on the Crown to supply the deficiency. The case of the *Merchants of England* v. *The Earl of Flanders* (1 Vol. Rotuli Parliamentorium, 18th Ed., p. 61) is an authority on both these points." In the language of the Lord Chancellor will be found these words. "The Crown can not do acts which are against natural equity without the law affording some remedy." And, it will be found that in dismissing the appeal upon the ground that the appellant had not complied with the applicable statute in establishing his claim, the Lord Chancellor observed: "The only action he could maintain would be an action of *tort* and *tort* is not maintainable against the crown." Thus is highlighted the soundness of this plaintiff's case, in view of the enactment of the Federal Tort Claims Act and its significance which the courts below spurned.

This case presents the opportunity for the Supreme Court to clarify the present law on this point which should, in the public interest and for the development of a sound international law, be availed of. For purposes of clarity as to our position, we are prepared to stand on whatever view the court may take of the issue; if it be held that no duty rests upon the United States to prosecute private war losses and no liability exists on the United States for their payment, our thesis is not shaken: we stand on the position, supported by earlier decisions of this court for a century and a half, that when the United States does elect to prosecute private war losses and does

collect thereon, even though it be but a sovereign act of grace, the proceeds in its treasury must go to the citizens and nationals who suffered those losses and are impressed with a trust therefor, where there exists as here no paramount claim of equity. (*United States* v. *Cooper,* 120 U. S. 124, 26 L. Ed. 721, 723 (1887); *United States* v. *Taylor,* 104 U. S. 216; 26 L. Ed. 721 (1881); *United States* v. *Wardwell,* 172 U. S. 48, 43 L. Ed. 360 (1898); *Burnell* v. *United States,* 44 Ct. Cls. 535)

Point VII. There does not exist in any opinion of the Supreme Court, of which we know, a modern, comprehensive and conclusive definition of the word "tort" to parallel that of the distinguished Judge Finch of the Court of Appeals of New York in *Rich* v. *New York Central Railroad* (87 N. Y. 382), quoted in part below:

> "We have been unable to find any accurate or perfect definition of a tort. Between actions ex contractu and those clearly ex delicto, there exists what has been termed a borderland, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly co-incident as to make their practical separation somewhat difficult. * * * And, yet, it is conceded that a tort may grow out of, or make part of, or be co-incident with a contract and that precisely the same state of facts, between the same parties, may admit of an action ex contractu or ex delicto. Obviously the essence of a tort consists in a violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, generally separable from the breach of contract. * * * It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the cases referred to in the respondent's

> argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation but upon the original moral duty enjoined upon every person to conduct himself in exercise of his own rights as not to injure another. Whatever its origin, such legal duty is uniformly recognized and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in human society. It is then doubtless true that a mere contract obligation may establish no relation out of which separate and specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty and its omission a wrong to be redressed. The duty and the *tort* grow out of the entire range of facts of which the breach of contract is but one. The whole doctrine is accurately and concisely stated in 1 Chitty Pleading 135, that 'if a common law duty result from the facts, the party may sue in tort for any negligence and malfeasance in the execution of the contract' ".

Without some conclusive definition of the word "tort" by the Supreme Court, the Federal Tort Claims Act, by its very nomenclature, will lead to endless controversy. For example, the rights of the parties here petitioning can not be determined until the Supreme Court says with final authority, with which it alone is vested, whether it concurs in the general view of lesser tribunals and all text book writers and encyclopaedists that the breach of an express or implied trust is a tort, as that word has been defined for centuries in the common and civil law, and as it is used *not in* (for the word does not occur in the act itself) but in the citation title of the Federal Tort Claims Act. In this connection there remains the corollary question whether

the language of the Act itself is not so broad, and intentionally so, that it includes every conceivable type of wrongdoing resulting in injury to person or property, and was so intended, which appears to be the view of the Supreme Court in the recent decision in the *Brooks* case.

Point VIII. To let this case be forever embalmed upon the unreported and vacuous opinions of the courts below will be a tragedy of the law, because of the historic change it negates, through judicial amendment and interstitial legislation by the judicial branch of the Government, in throwing us back to the doctrine sponsored by King James three hundred and forty-six years ago that "The King can do no wrong."

Since the filing of the complaint herein, two Congresses have convened and had adequate opportunity to amend the Federal Tort Claims Act, if our interpretation of that law is incorrect and not in accord with what the Congress meant. Being advised of this action, it was the duty of the Attorney General to call this litigation to the attention of the Congress, if there is any sincerity in his contention that our construction is wrong. Neither he nor any court in the land has the right to substitute his or its judgment for that of the Congress or to usurp its power by amendment of the law by his or its opinions.

Point IX. As the case comes to the Supreme Court on petition for certiorari, the record shows:

(1) The government moved to dismiss upon the general ground that the complaint failed to state a cause of action upon which relief may be granted; that there was a misjoinder of parties defendant, and that the complaint shows on its face that the action is barred by the Statute of Limitations. No reference was made to any of these grounds in the decision of the courts below.

(2) The District Court (McGuire, J.) dismissed the complaint apparently on the ground of Sec. 4(h) of the Settlement of War Claims Act of 1928 (45 Stat. 254)—a point not raised or argued before him and

totally and palpably of no relevancy, since no such contention had been made by the plaintiffs and it in no way affected their case that the United States had disclaimed liability for the payment of awards under the Act. Their case rested on the liability, unaided by statute, under the centuries old laws of trust; and at law, by statute, under the Federal Tort Claims Act.

(3) The Court of Appeals based its *per curiam* (Bennett, Proctor, and Lederle, JJ) on a *close examination* "of the available record" and found "no error in it to justify reversal." The court persisted in this view after a petition for rehearing and six months consideration of the case. The only record, the whole record, if such may be called a record, consisted of a complaint of six printed pages. There was no testimony and not a single exhibit; no trial or hearing, except on the motion to dismiss. What record the Court of Appeals closely examined to us seems metaphysical.

Point X. In this utterly unprecedented case, involving over one hundred million dollars awarded to American citizens and nationals from ten to thirty years ago for private war losses suffered and proved by them, and still unpaid, neither court below has seen fit even to mention, much less allude to a single authority cited in the plaintiff's brief, as follows:

United States v. *Taylor,* 104 U. S. 216, 26 L. ed. 721, 723 (1881)
United States v. *Cooper,* 120 U. S. 124, 30 L. ed. 606 (1887)
United States v. *Wardwell,* 172 U. S. 48, 43 L. ed. 360 (1898)
Burnell v. *United States,* 44 Ct. Cls. 535
Williams v. *Heard,* 140 U. S. 528, 35 L. ed. 550, 555, 556 (1891)
LeCrone v. *McAdoo,* 253 U. S. 217, 64 L. ed. 869 (1920)
Comegys v. *Vasse,* 1 Pet. (U. S.) 193, 7 L. ed. 108 (1828)
54 Am. Jur. 105, Sec. 119
Frelinghuysen v. *Key,* 110 U. S. 63, 28 L. ed. 71 (1884)
Bank of United States v. *Planters Bank of Georgia,* 9 Wheat. 904, 6 L. ed. 244, 245 (1825)

Chesapeake and Delaware Canal Co. v. *United States,* 250 U. S. 123, 63 L. ed. 889, 892 (1919)
Van Brocklin v. *Tennessee,* 117 U. S. 151, 29 L. ed. 845, 847, 6 S. Ct. 670 (1886)
United States v. *Insley,* 130 U. S. 263, 32 L. ed. 968, 969, 9 S. Ct. 845 (1889)
United States v. *O'Grady's Executors,* 23 Wall. 641, 22 L. ed. 772 (1875)
United States v. *Klein,* 13 Wall. 128, 60 U. S. 519, 20 L. ed. 519 (1872)
United States v. *Padelford,* 9 Wall. 531, 19 L. ed. 789, 792 (1870)
Senate Report No. 1400, 79th Cong., on S. 2177, which included the Tort Claims Act.

Point XI. In our motion for rehearing in the Court of Appeals, we said, though it fell upon deaf ears, what we here repeat:

The provisions of the Tort Claims Act were discussed in the briefs of appellants. The applicability of such provisions to an action of this kind, particularly in view of the actions of the Secretary of the Treasury, was urged and explained. Counsel for appellants gave much thought and consideration to that question, and, whether right or wrong, they were of the opinion that a proper interpretation and construction of the statute, particularly in view of its remedial nature, would include an action of the nature of that set forth in the complaints herein.

Counsel for appellants hoped for the sound advice and wise judgment of this Court upon that question also, and the failure to receive them is quite disappointing.

Counsel are bewildered and somewhat baffled by the language of the opinion of this Court that "The Court has closely examined the available record and finds no error in it to justify reversal." The "available record" constitutes all pleadings, motions, orders, memoranda, and pertinent papers filed in the court below. There is nothing else available, so far as known to counsel, except the Clerk's docket entries in the court below. The only docu-

ments of importance before the Court, however, were the complaints, all of which were substantially the same. It seems unusual to denominate a complaint as a record, when tested by a motion to dismiss. Of course, the opinion of the trial court sustaining the motion to dismiss constitutes a part of the record, but if the complaint states a cause of action, then the lower court clearly was in error in dismissing it. Since, as demonstrated above, the lower court entirely misconceived the true theory of the trust fund doctrine invoked by appellants, the record discloses "error in it to justify reversal." If not deemed sufficient to justify reversal, such error seems sufficiently important to warrant full discussion and demonstration of how and why these appellants are not entitled to a trial on the merits and their day in court on complaints clearly adequate in allegations to create justiciable issues if denied, and clearly sufficient when admitted by motion to dismiss to form the basis for a judgment in favor of appellants.

However, whatever difficulties are presented by the language of this Court's decision in virtually foreclosing intelligent presentation of grounds for reargument or preparation of a petition for writ of certiorari without wandering over the entire field of possible grounds forming the basis of the decision, happily subsequent events, which this Court properly may and should judicially notice, present, in the view of appellants, a compelling and unanswerable ground for rehearing. This appeal was argued April 15, 1949, and decided on June 13, 1949. On May 24, 1949, the President approved Public Law No. 71 of the present 81st Congress, which, among other things, provided for the payment of the expenses of the War Claims Commission, which was established by Public Law No. 896, 80th Congress. That Commission is solely an administrative agency of the United States, differing from the previous claims commission only in the task assigned by the terms of the act from the Bureau of Internal Revenue. This agency is to be supported exclusively out of money and property

seized from Germany and German nationals. Thus, while this Court was considering this case, the Congress of the United States, with the approval of the President, perfected the appellants' case by legislative action which did not and could not appear "in the available record." The United States, we maintain, has now actually and undeniably converted a trust fund held by it for the appellants under recognized rules of law and equity and has taken out of such trust fund money to pay its own expenses.

Appellants' case rests primarily upon two grounds: (1) That historically and from the beginning of the Republic, the United States, *quoad hoc*, by its own courts had been held to the performance of its duties as trustees, where its own declarations, conduct or events had placed upon it the responsibility of trustee toward its citizens or any group or class thereof. This point is fully demonstrated and sustained by the authorities cited in appellants' briefs. (2) The specific assumption of liability by the United States in the Federal Tort Claims Act. This point is fully discussed in the briefs of appellants.

From the cryptic decision of this Court what conclusions are lawyers, courts and litigants to draw if that decision should be the last judicial word in this case. The following questions occur to appellants: (a) Under no circumstances has the United States any liability to deal justly, meet its fiduciary obligations, and to do that which is *ex sequo et bone*. (b) Is not the United States, like a citizen, subject to penalty and punishment when it converts money and property impressed with a trust in favor of certain of its citizens. (c) Does not the Federal Tort Claims Act apply, and if not, why? On this point the future researcher, using the decision in this case, may build a brief that will completely frustrate the intent of Congress in enacting the Federal Tort Claims Act, if the facts pleaded by appellants are not a wrong within its terms. (d) Does this Court disagree with other courts and the scholarly definition of Judge Finch by excluding the violation of a trust

duty from the meaning of the Tort Claims Act? (e) Is not the decision of the trial court and its affirmance by this Court an amendment of the Tort Claims Act which clearly provides that the United States shall be liable for any wrong if a private citizen in like circumstances would be liable, and would not that be judicial legislation? (f) Does not the situation in this case nullify an expressed policy of the Congress, as shown by the Senate Report on S. 2177, 79th Congress, and thus constitute a "writing off" of a half century of legislation consistent with that policy? (g) No ground for the dismissal of the complaints in this case has been enunciated. The trial court said the Tort Claims Act did not apply, and then misconceived the trust fund theory. Determination of the reasons for dismissal is left to conjecture. Affirmance without the statement of grounds or reasons therefor only confuses appellants. They desire the exercise of this Court's wisdom and experience in deciding and explaining what, to them, after months of deliberations and consideration, they deem valuable rights. Summary denial of these rights without any explanation or reasoning tends to shatter their conception of that treatment they have always believed they were entitled to receive.

Point XII. In addition to the difficulties of counsel thus recited, there baffles them the question, why, by the nature of the proceedings, it is factually admitted that the United States holds funds collected for this plaintiff and others similarly situated, any court can deny the plaintiff the right to present the cause in any tribunal of the United States. There is no denial, necessarily, so, on a motion to dismiss, of what seems to us purely factual allegations and the inferences to be drawn therefrom (as distinguished from conclusions of law) set forth in the complaint as follows:

> Par. 9. "the Secretary of the Treasury applied certain monies and properties, then in the possession of the Alien Property Custodian of the United States and intended for the benefit of this plaintiff to other payments," etc.

Par. 13. "the defendant United States of America, has made no effort to apply any of the monies and properties", etc.

Par. 15. "such properties and monies—became and still are impressed with a trust in favor of the plaintiff", etc.

Par. 16. "By virtue of the Settlement of War Claims Act, the defendant, United States of America had and claimed to have no interest except as trustee."

Par. 14. "No individual, firm, corporation or national of the United States, or of any other country has or claims to have any right to any part of the monies and properties referred to above and now in the custody and possession of the defendants."

Par. 21. "all monies in the German Special Deposit Account and the German bonds aforesaid were, by virtue of the treaty and agreement between the United States and Germany, received in express trust for the benefit of the plaintiff."

None of these allegations is denied and they seem to us clear allegations of fact. Having avoided, as required by good pleading, the pleading of evidence, it is difficult to see by what reasoning and authority the plaintiff is barred from presenting its evidence.

Point XIII. If this action in the present state of the proceeding passes into the archives of juridical precedent, there will have transpired one of those amazing incidents in jurisprudence, similar to that which frustrated the Statute of Uses four hundred years ago. As this court has observed in the Brooks Case, there were eighteen tort claims bills introduced in the Congress in the decade between 1925 and 1935. When in 1946, the Congress acted because, in the Senate Committee's words (see Report No. 1400), the doctrine that "the King can do no wrong" only was the only justification "seems historical", in keeping the words of the Chancellor of England that the doctrine is "a survival that should be swept away", it is fair to assume that the Congress was well aware that it moved Anglo-Saxon justice forward three hundred and fifty years

and held sovereignty for the first time in history to the moral responsibilities enforced against its citizens and nationals. We plead with this Court to hear this cause, lest the monstrous thing happen that the Federal Tort Claims Act be construed to exempt and license acts of the Sovereign in the betrayal of trust and confidence which from time immemorial have "shocked the Chancellor's foot." If such is the meaning of the Federal Tort Claims Act, it "blacks out" what great justices of this court since the days of Marshall have said as to the responsibilities of the United States in such trust relationships. Certainly if this is to be the construction placed on the Federal Tort Claims Act, no lesser court than this tribunal should take the responsibility of decreeing it, for then as in the scriptural parable "the last state is worse than the first."

Point XIV. As this record stands, and unless this Court intervenes, the decisions below, if they escape oblivion, will sum up to a new doctrine to replace that of King James and going far beyond the maxim that the "King can do no wrong." That new doctrine will be this: *"No rule of law, equity or conscience binds the sovereign and no trust can be enforced against him."* In short, the "keeper of the King's conscience will be *functus officio*".

Point XV. We are, and from the beginning of this litigation, have been well aware of the enormous difficulty of seeking a massive judgment against the United States of America in Federal Courts guarded by Federal officials and employees. We are likewise alert to the observation of a long experienced and eminent practitioner that "No debtor is more unscrupulous than the Government and no creditor more cruel, that no plaintiff is more ruthless and no debtor more evasive." If such obstacle exists, we can only point out that this plaintiff is not seeking to deplete the Treasury of the United States or to take judgment against its assets. The recovery sought will come out of or be fully compensated by the proceeds now in special

accounts in the United States Treasury, resulting from the seizure and divestment of enemy assets in time of war. (Public Law 806, 80th Cong., Chapter 826, 2nd Sess.)

Point XVI. Were the position of the parties reversed and had the decisions below gone against the Government, it is safe to assume that its law officers would be here pleading for a writ, sounding the same *ad horrorem* note which they sounded in the Brooks Case when it was before this Court. Naturally, the far reaching importance of the implications of the decision to the Government as distinguished from the citizenry.

Point XVII. Nowhere in the courts below does any consideration appear to have been given to the Certificate of Indebtedness issued by the Secretary of the Treasury and the legal implications to be drawn from the fact, as we are informed, that this conforms to the established practice in dealing with "trust funds" as in the case of Social Security Taxes. Under Section 25 of the Trading with the Enemy Act, as amended, enemy property instantly upon seizure passes under a trust by the language of the section. Such was its status when this action was begun. Subsequent action by the United States could not alter the rights of these plaintiffs and does underline the tortious wrong done them in not applying these enemy assets to their awards against Germany, as they were the only persons having a legal or equitable claim thereon.

H. G. A.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 561

STANDARD COMMERCIAL TOBACCO COMPANY AND STANDARD COMMERCIAL STEAMSHIP CORP., PETITIONERS,

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 16A-17A) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 26) is reported at 176 F. 2d 951.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was

entered on June 13, 1949 (R. 27). A petition for rehearing (R. 28-36) was denied on September 28, 1949 (R. 37). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to January 28, 1950 (R. 39). The petition for a writ of certiorari was filed on January 27, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

In partial fulfillment of her World War I obligations, fixed by the Mixed Claims Commission, Germany undertook to make certain payments to the United States to be applied on awards made by the Commission. The United States distributed these payments among American nationals, including petitioners, who had received awards. In 1931, Germany, before completing the required payments, defaulted.

The questions presented are:

1. Whether the United States may be held liable to petitioners under the Federal Tort Claims Act for judgments in amounts equal to the unpaid portion of petitioners' World War I awards.

2. If so, whether the Secretary of the Treasury may be ordered to pay such amounts out of German property sequestered by the Alien Property Custodian during World War II, notwithstanding the fact that Congress has provided for a different disposition of the sequestered funds.

STATUTES INVOLVED

1. The pertinent provisions of Sections 410, 420 and 421 of the Federal Tort Claims Act[1] are set forth in the Appendix, *infra*, pp. 19-21.

2. The English text of the Agreement of August 10, 1922, between the United States and Germany (42 Stat. 2200) is set forth in the Appendix, *infra*, pp. 21-23.

3. The pertinent provisions of Section 2 of the Settlement of War Claims Act of 1928 (45 Stat. 254), authorizing payment of Mixed Claims Commission awards out of the German Special Deposit Account are set forth in the Appendix, *infra*, pp. 24-25.

4. Section 4 of the Settlement of War Claims Act of 1928 (45 Stat. 260) as amended by the Act of August 6, 1947 (61 Stat. 789), creating the German Special Deposit Account and establishing the order of priority of payment out of that fund, is set forth in the Appendix, *infra*, pp. 25-30.

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[1] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. 921 *et seq.*) was repealed, and its provisions were revised and reenacted into law as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948 (Pub. Law 773, 80th Cong., 2d sess.). Section 39 of the repealing act provides that existing rights and liabilities shall not be affected by the repeal. Since the case at bar arose prior to the repeal, it appears that any rights which petitioner may have against the United States herein are governed by the Federal Tort Claims Act as it existed at the time of the repeal. It is the former provisions of the Act, therefore, which are set out in the Appendix, *infra*, pp. 19-21.

STATEMENT

This suit was instituted by Katharine M. Drier in the United States District Court for the District of Columbia on February 28, 1947, on behalf of herself and persons and corporations similarly situated, under the Settlement of War Claims Act of 1928 (R. 20). Her complaint, to "Enforce Payments of Funds by the Secretary of Treasury" and for "Damages to or Loss of Property under the Federal Tort Claims Act", claimed judgment against the United States for the unpaid World War I damages she had been caused by Germany, as determined by the Mixed Claims Commission (R. 20, 25). The complaint also prayed for an order directing the respondent Secretary of the Treasury to pay her the amount of such judgment "out of the monies and properties of Germany and German nationals in his possession or under his control" (R. 25).

Petitioners, Standard Commercial Tobacco Company and Standard Commercial Steamship Corporation, being two of the "similarly situated" corporations, which had sustained World War I damages for which they had not been fully compensated, filed complaints in intervention (R. 2A-16A).

Standard Commercial Tobacco Company alleged that it holds an award of the Mixed Claims Commission in the amount of $450,000 with interest at 5% from November 11, 1918, on which there was due and owing as of October 22, 1941, on account

of principal a balance of $146,220.99,[2] and unpaid interest of $147,663.73, a total of $293,884.72, with further accruals of interest since that date (R. 3A). Standard Commercial Steamship Corporation alleged that it holds an award of the Mixed Claims Commission in the amount of $89,294.00 with interest of 5% from November 11, 1918, on which there was due and owing as of October 20, 1941, on account of principal a balance of $7,921.02[3] and interest of $12,390.86, a total of $20,311.88, with further accruals of interest since that date (R. 10A).

Each of the intervening complaints and Mrs. Drier's original complaint alleged that the actions were brought under the Federal Tort Claims Act and that the respondent Secretary of the Treasury was sued in his official capacity (R. 3A, 10A, 20). The complaints asserted that Germany had agreed to pay in full for World War I damages as deter-

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[2] This petitioner has, in fact, already received more than the $450,000.00 principal amount of its award. The alleged balance of $146,220.99 was arrived at by adding to the $450,000, interest amounting to $205,643.84, for the period from November 11, 1918, through January 1, 1928. From that total of $655,643.84, there was deducted the sums of $509,422.85 (paid over by the United States to petitioner on the principal amount of the $450,000.00 award), leaving the balance of $146,220.99.

[3] This petitioner has, in fact, also already received more than the $89,294.00 principal amount of its award. The alleged balance of $7,921.02 was arrived at by adding to the $89,294.00, interest amounting to $40,806.13, for the period from November 11, 1918, through January 1, 1928. From that total of $130,100.13, there was deducted the sum of $122,179.11 (paid over by the United States to petitioner on the principal amount of the $89,294.00 award), leaving the balance of $7,921.02.

mined by the Mixed Claims Commission; that these amounts were not fully paid; that following the 1941 declaration of war with Germany, the United States vested in itself title to properties belonging to the German Government and German nationals, and that such properties "became and still are impressed with a trust in favor of" the petitioners and others similarly situated (R. 5A, 12A, 23). Petitioners further alleged that the failure of the respondents to apply these "trust" properties to the payment of petitioners' unpaid Mixed Claims Commission's awards constituted a breach of trust actionable under the Federal Tort Claims Act (R. 6A, 13A, 24).

The complaint filed by Mrs. Drier alleged that that demand had been made by her on respondents for payment of the balance due her, but that the respondent Secretary of the Treasury refused to make such payment (R. 24). The intervening complaints made no similar demands upon either the Secretary of the Treasury or the United States, but merely alleged that, in light of the rejection of Mrs. Drier's claim by the Secretary of the Treasury, similar demands upon their part would be futile (R. 7A, 14A).

On February 10, 1948, the district court ruled that the complaints failed to state a claim on which relief could be granted and dismissed the complaints on the grounds that the "Federal Tort Claims Act does not apply, either in terms or con-

struction," and that "any purported claim of liability is specifically negatived by the provisions of the War Claims Act of 1928 (45 Stat. 254)" which provides that nothing in the Act shall be construed as the "assumption of liability by the United States for the payments of awards" (R. 16A-17A, see Appendix, *infra,* pp. 24-25). On appeal to the United States Court of Appeals for the District of Columbia the judgment of dismissal was affirmed in a *per curiam* opinion (R. 26).[4]

The genesis of petitioners' claims, though not fully disclosed in the record, is readily apparent from the official records of international arrangements made to compensate Americans whose property was confiscated by Germany during World War I. Within two months after the Joint Resolution of July 2, 1921 (42 Stat. 105) had terminated the war between Germany and the United States, a formal peace treaty, the Treaty of Berlin, was concluded. That Treaty obligated Germany "to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages" enumerated in the Joint Resolution of July 2, 1921. (42 Stat.

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[4] Mrs. Drier, the original complainant, did not seek review of the decision of the court of appeals. Petitioners were also "reluctant" to petition for writs of certiorari, but decided to file petitions after "receiving notice of the decision of this Court on December 12, 1949, in the cases of United States v. Aetna Casualty Co. * * *" [No. 35, this Term]. See p. 3 of Petitioners' "Motion to Extend Time for Filing Petition for Writ of Certiorari" and p. 1 of the Affidavit attached to the motion.

1939, 1942). In order to determine the amount to be paid by Germany in satisfaction of her financial obligations to the United States under the Treaty of Berlin, an agreement was made between the two Governments on August 10, 1922 (42 Stat. 2200), providing for the establishment of a Mixed Claims Commission.

The Commission consisted of three members, one appointed by the United States, another by Germany, and an umpire, selected by the two Governments, who decided "any cases concerning which the commissioners" disagreed. 42 Stat. 2201. More than 20,000 claims were presented by the United States to the Commission, which entered a total of 7,025 awards. Final Report of H. H. Martin, Acting Agent of the United States before the Mixed Claims Commission (1941), p. 94.

In 1928 Congress passed the Settlement of War Claims Act (45 Stat. 254) establishing the fund known as the German Special Deposit Account out of which the Commission's awards to the United States on behalf of American nationals were to be paid. The Act provided that 20% of the seized property of World War I German nationals, together with funds contributed by Germany for the payment of the awards, should be paid into the Special Account. It further provided for the return to German nationals of the remaining 80% of the seized property which the United States then held for the protection of the American awards.

On June 23, 1930, in accordance with the provisions of the Debt Funding Agreement between Germany and the United States pursuant to the Act of June 5, 1930 (46 Stat. 500), the United States accepted German bonds in a sum sufficient to liquidate all of the unpaid awards of the Commission. The bonds were to be paid in 103 installments covering a period expiring March 31, 1981. Germany defaulted after paying the third installment on March 30, 1931. Final Report of H. H. Martin, Acting Agent of the United States before the Mixed Claims Commission (1941), p. 95. By that time most of the 80% of the seized German property, which the United States had held for payment of the American awards, had already been released as required by the Settlement of War Claims Act. 93 Cong. Rec. 9289. In order to cut off a still further depletion of that property, the Harrison Resolution of June 27, 1934 (48 Stat. 1267), directed that all further payments under the Settlement of War Claims Act, insofar as it called for payments to German nationals, should be postponed so long as Germany remains in default.

Because of Germany's default, the balance in the Special Account was insufficient to make further payments on the Commission's awards.[5] However,

[5] The Act of August 6, 1947 (61 Stat. 789), provided for the building up of the Special Account by transferring to it, from the Alien Property Trust Fund, about $8,000,000 of seized German World War I property, which would have been returnable to its former German owners but for the Harrison Resolution. House Report No. 973, 80th Cong., 1st sess., p. 2; Senate Report No. 679, 80th Cong., 1st sess., p. 2.

despite that default, all but 451 of the 7,025 awards made by the Mixed Claims Commission on claims of American nationals arising out of World War I have been paid in full. Those claims paid in full include all awards on account of death or personal injury as well as all property damage claims of $100,000 or less. The 451 partially-paid awards represent property damage claims in excess of $100,000. (93 Cong. Rec. 9288.)

ARGUMENT

Petitioners contend that the awards of the Mixed Claims Commission resulted in a trust of which Germany was the settlor, the United States the trustee and petitioners the beneficiaries. They further argue that the United States violated that "trust" when it failed to apply German property seized during World War II to the payment of their awards. Finally it is urged that the alleged breach of trust constitutes a tort, actionable under the Federal Tort Claims Act. These arguments were urged upon, and rejected by, both courts below. That rejection, we submit, was plainly correct and does not warrant further review by this Court.

1. The conclusive answer to petitioners' trust-creation theory is that it is "impossible to hold the United States to be a trustee for anyone when it receives a sum of money from a foreign government, paid in pursuance of a treaty, for the satisfaction of claims of American citizens against such

government * * *." *Great Western Insurance Co.* v. *United States,* 19 C. Cls. 206, 217, affirmed on other grounds, 112 U. S. 193; cf. *Angarica* v. *Bayard,* 127 U. S. 251, 259; Koessler, *Government Espousal of Private Claims Before International Tribunals,* 13 U. of Chi. L. Rev. 180, 182 (1946). Well-settled principles of international law and the provisions of the Settlement of War Claims Act of 1928, which created the German Special Deposit Account, bring that impossibility into sharp focus in the instant case.

Since foreign governments may not without their consent be subjected to suits in the courts of the United States, the claims of American nationals against such governments may be prosecuted "not by suit in the courts, as of right, but by diplomacy, or, if need be, by war" *United States* v. *Dickelman,* 92 U. S. 520, 524; *Frelinghuysen* v. *Key,* 110 U. S. 63, 72; *The Exchange,* 7 Cranch 116. Only with the consent of the government involved will a claim on behalf of a national of one sovereign be allowed to proceed against another sovereign. See *United States* v. *Dickelman,* 92 U. S. 520, 524; *LaAbra Silver Mining Co.* v. *United States,* 175 U. S. 423, 455-463.

In the orderly conduct of its foreign relations it is obvious that a Government must be allowed to exercise its discretion as to whether it should espouse the claim of one of its nationals against a foreign government. Jessup, *A Modern Law of Nations* (1948), p. 98. When it does espouse a claim,

as the United States did when it provided for the creation of the Mixed Claims Commission and presented to that Commission the claims of its nationals, it makes those claims "its own." *Boynton* v. *Blaine,* 139 U. S. 306, 323. As this Court pointed out in *Z. and F. Assets Corp.* v. *Hull,* 311 U. S. 470, 487, "the claims to be considered by the [Mixed Claims] Commission were only those sponsored and presented by the United States against Germany. They were presented as claims of the United States, the national claimants themselves having no standing save as they were represented by the United States." Moreover, not only do the espoused claims themselves become those of the Government, but the funds received by the United States, in payment, are property of the United States until payment is made to the private claimants. *Williams* v. *Heard,* 140 U. S. 529, 537-538. Although the United States is under a "moral obligation" to make payment, "no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund." *Williams* v. *Heard, supra.*

The Settlement of War Claims Act of 1928, in creating the German Special Deposit Account, fully recognized this lack of legal or equitable ownership on the part of individual claimants and, far from establishing any private rights in those claimants, specifically prohibited the assumption by the

United States of any liability to them (R. 16A); Section 2(h), Appendix, *infra*, pp. 24-25. The funds in that account have accordingly been held to be under the absolute ownership of the United States. *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120-124; *Drier* v. *United States*, 108 C. Cls. 487, 490. This absolute ownership on the part of the United States precludes, of course, the existence of any trust in favor of the individual claimants.

2. Even assuming the creation of a trust to benefit American owners of property seized by Germany during World War I, the record here shows no violation of that trust. Its *res* would have had to be either the monies retained under the Settlement of War Claims Act of 1928 or those received from Germany under the Debt Funding Agreement of 1930 (*supra*, pp. 8-9), *i.e.*, the payments earmarked for the satisfaction of Mixed Claims Commission's awards. In none of the complaints in this case, however, is there any allegation that these funds were not applied to the satisfaction of those awards.

Petitioners' assumption that the trust *res* consists of German property sequestered by the United States during World War II is completely unfounded. Certainly, not a syllable in the Settlement of War Claims Act of 1928, or in the Debt Funding Agreement, would warrant allocating alien property seized during World War II for the purpose of indemnifying petitioners' World War I

damages. That such an allocation was never intended by Congress is made further apparent by its rejection of prior attempts by World War I claimants to be paid out of the World War II funds. See Memoranda and discussion on "Indebtedness to American Nationals on World War I Adjudicated Awards of the Mixed Claims Commission," pp. 46-56, 138-157, Hearings before the Senate Committee on the Judiciary on H. R. 4044, 80th Cong., 2d sess. In fact, at those hearings, counsel for the World War I claimants specifically admitted that, apart from a small balance of funds left over from *World War I,* his clients have no claim to "any other funds now in the hands of the Alien Property Custodian." *Id.* at p. 157. Even more significant is the fact that when Congress enacted H. R. 4044 into the War Claims Act of 1948 (Public Law 896, 80th Cong., 2d sess.), it set up a comprehensive scheme for the disposition of property seized during World War II but made absolutely no provision for an allocation of any of that property to the satisfaction of World War I claims.

3. Finally, the language of the Federal Tort Claims Act and its express exceptions make it obvious that that Act may not be here applied even if the breach of a trust relationship is assumed.

a. The type of damage for which the United States assumed liability under the Federal Tort Claims Act is "damage to or loss of property or * * * personal injury or death". Section 410(a),

Appendix, *infra,* pp. 19-20. This language relates to the ordinary common law tort resulting from trespass, and connotes physical damage. It is consistent with the title of the Act which refers only to "tort claims." The Act's legislative history also shows that it was intended to encompass common law tort claims only. Thus, the purpose of the contemplated legislation was stated to be to allow suit "against the Government in respect to any common law tort." It was further stated that the "existing exemption in respect to common law torts appears incongruous. Its only justification seems to be historical. With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles." House Report No. 2428 on H. R. 7236, 76th Cong., 3d sess., pp. 2-3. See also Senate Report 1196 on S. 2221, 77th Cong., 2d sess., p. 5.

It is well-settled that the beneficiary of a trust may not maintain an action at law in tort against the trustee for breach of trust. 2 Scott, *Trusts,* Sec. 197.1 (1939). His remedies against the trustee are traditionally equitable. *McKee* v. *Lamon,* 159 U. S. 317, 322. He may sue for the specific enforcement of the trustee's duties, seek to enjoin the trustee from violating the trust, or institute proceedings for the removal of the trustee and the appointment of a receiver to administer the trust. In the

few instances where the beneficiary may sue at law, he is restricted to an action for money had and received. *Carl Byoir and Associates* v. *Tsune-Chi Yu,* 112 F. 2d 885 (C. A. 2), certiorari denied, 311 U. S. 699; *Parker State Bank* v. *Pennington,* 9 F. 2d 966, 969 (C. A. 8); see Restatement, *Trusts,* Section 198. Since he may not, however, proceed at law in an action in tort, the Federal Tort Claims Act is, we submit, inapplicable.

b. At least one express exception in the Federal Tort Claims Act furnishes another, independent ground for its inapplicability to the claims here presented by petitioners. Section 421(e) expressly excludes "any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the EnemyAct, as amended." (Appendix, *infra,* p. 21). As pointed out above, pp. 7-8, the relief sought by petitioners is based on rights which they claim under the Settlement of War Claims Act of 1928. That Act specifically states that it is an amendment to the Trading with the Enemy Act. (45 Stat. 254, 268, 270, 271). That it means just what it says is evident from the concurring opinion of Mr. Justice Burton in *Markham* v. *Cabell,* 326 U. S. 404, 413, where the history of the Trading with the Enemy Act and its amendments are reviewed. The opinion points out that "later amendments [*i.e.,* of the Trading with the Enemy Act] emphasized this restriction of Section 9(e) to World War I, while

preserving the general and permanent character of Section 9(a)". 326 U. S. 404, 418. In a footnote to that quotation the "later amendments" are enumerated. Included in that enumeration is the Act of "March 10, 1928 (45 Stat. 254-279). This was the 'Settlement of War Claims Act of 1928.' It dealt expressly with World War I. It was concerned with such subjects as the 'Mixed Claims Commission' and 'The Tripartite Claims Commission.' *It amended the Trading with the Enemy Act in many details as to World War I claims and added many new provisions as to those claims".* 326 U. S. 404, 418-419, fn. 4. (Emphasis supplied).

c. In addition, the Federal Tort Claims Act authorizes the entry of judgments for claims against the United States for money only. Section 410(a), Appendix, *infra,* p. 19. These judgments are payable out of specific "appropriation Act(s)" especially passed for that purpose. 28 U. S. C. 2411, 28 U. S. C. 2517; and see Section 411, Federal Tort Claims Act, 60 Stat. 844. Here, however, petitioners seek payment by the respondent Secretary of the Treasury out of the German Special Deposit Account—a result obviously inconsistent with the Act.[6]

---

[6] As far as the respondent Secretary of the Treasury is concerned, there is no allegation in any of the complaints that pursuant to Section 2(a) of the 1928 Act (Appendix, *infra,* p. 24) the Secretary of State has certified to the Secretary of the Treasury the portions of the Mixed Claims Commission awards here involved. Under the 1928 Act the Secretary of State alone has the authority to consider and

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1950.

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pass upon the regularity and validity of the awards made by the Mixed Claims Commission for the statutory purpose of qualifying them for payment by the Secretary of the Treasury. In the absence of an allegation of certification by the Secretary of State, there is no basis upon which the Secretary of the Treasury could make payment of the award even were such a matter one where resort could be had to the courts. *Z. and F. Assets Corp.* v. *Hull*, 311 U. S. 470, 486-487.

APPENDIX

1. Sections 410, 420, 421 of the Federal Tort Claims Act (60 Stat. 842, 843-846)[7] provide in pertinent part:

> SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judg-

[7] See footnote 1, *supra*, p. 3.

ment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. * * *

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within the year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

SEC. 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

* * * * *

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

* * * * *

2. The Agreement of August 10, 1922, between the United States and Germany, 42 Stat. 2200, provided:

The United States of America
and
Germany,

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty

concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany,

and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Wirth, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

* * * * *

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above-named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

[SEAL] ALANSON B. HOUGHTON.
[SEAL] WIRTH.

3. Section 2 of the Settlement of War Claims Act of 1928 (45 Stat. 254) provides in pertinent part:

> SEC. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the "Mixed Claims Commission").
>
> (b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.
>
> (c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b) and remaining unpaid, beginning January 1, 1928, until paid.
>
> (d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4.
>
> * * * * *
>
> (h) Nothing in this section shall be construed as the assumption of a liability by the United States for the payment of the awards of

the Mixed Claims Commission, nor shall any payment under this section be construed as the satisfaction, in whole or in part, of any of such awards, or as extinguishing or diminishing the liability of Germany for the satisfaction in full of such awards, but shall be considered only as an advance by the United States until all the payments from Germany in satisfaction of the awards have been received. Upon any payment under this section of an amount in respect of an award, the rights in respect of the award and of the claim in respect of which the award was made shall be held to have been assigned pro tanto to the United States, to be enforced by and on behalf of the United States against Germany, in the same manner and to the same extent as such rights would be enforced on behalf of the American national.

(i) Any person who makes application for payment under this section shall be held to have consented to all the provisions of this Act.

* * * * *

4. Section 4 of the Settlement of War Claims Act of 1928 (45 Stat. 260, as amended by the Act of August 6, 1947, 61 Stat. 789) provides:

SEC. 4. (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

(b) The Secretary of the Treasury is authorized and directed to deposit in such special deposit account—

(1) All sums invested or transferred by the Alien Property Custodian, under the provisions of section 25 of the Trading with the Enemy Act, as amended;

(2) The amounts appropriated under the authority of section 3 (relating to claims of German nationals);

(3) All money (including the proceeds of any property, rights, or benefits which may be sold or otherwise disposed of, upon such terms as he may prescribe) received, whether before or after the enactment of this Act, by the United States in respect of claims of the United States against Germany on account of the awards of the Mixed Claims Commission; and

(4) All money held in the Alien Property Trust Fund whose payment is restricted under the joint resolution entitled "Joint resolution to amend the Settlement of War Claims Act of 1928, as amended", approved June 27, 1934, other than property with respect to which the restrictions imposed by such joint resolution have been removed by the President prior to the enactment of this paragraph [August 6, 1947]. The Attorney General shall certify to the Secretary of the Treasury the amounts to be so deposited.

(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

(1) To make the payments of expenses of administration authorized by subsections (c) and (m) of section 3 or subsection (e) of this section;

(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed $100,000, and to pay interest thereon as provided in subsection (c) of section 2;

(4) To pay the amount of $100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of $100,000 and is not payable in full under paragraph (2) of this subsection. No person shall be paid under this paragraph and paragraph (3) an amount in excess of

$100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the Commission;

(6) To pay amounts determined by the Secretary of the Treasury to be payable in respect of the tentative awards of the Arbiter, in accordance with the provisions of subsection (s) of section 3 (relating to awards for ships, patents, and radio stations);

(7) To pay to German nationals such amounts as will make the aggregate pay-

ments equal to 50 per centum of the amounts awarded under section 3 (on account of ships, patents, and radio stations). Payments authorized by this paragraph or paragraph (6) may, to the extent of funds available under the provisions of subsection (d) of this section, be made whether or not the payments under paragraphs (1) to (5), inclusive, of this subsection have been completed;

(8) To pay (A) the accrued interest payable under subsection (c) of section (2) (in respect of awards of the Mixed Claims Commission) and (B) after such interest has been paid in full, to pay amounts equal to the difference between the aggregate payments (in respect of awards of the Mixed Claims Commission) authorized by subsections (b) and (c) of section 2 and the amounts previously paid in respect thereof: *Provided,* That, for the purpose only of subsection (c) of section 2, the amounts payable under subsection (b) of section 2 and remaining unpaid shall be deemed reduced by the amount of any payments of interest hereafter made under clause (A) hereof;

(9) To pay into the Treasury as miscellaneous receipts the amount of the awards of the Mixed Claims Commission to the United States on its own behalf on account of claims of the United States against Germany;

(10) To pay the accrued interest payable under subsection (h) of section 3 (in respect of awards to German nationals);

(11) To make such payments as are necessary (A) to repay the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading With the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld), (B) to pay amounts equal to the difference between the aggregate payments (in respect of claims of German nationals) authorized by subsections (g) and (h) of section 3 and the amounts previously paid in respect thereof. If funds available are not sufficient to make the total payments authorized by this paragraph, the amount of payments made from time to time shall be apportioned among the payments authorized under clauses (A) and (B), according to the aggregate amount remaining unpaid under each clause;

(12) To pay accrued interest upon the participating certificates evidencing the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading With the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld);

(13) To make such payments as are necessary to repay the amounts invested by the Alien Property Custodian under subsection (b) of section 25 of the Trading With the Enemy Act, as amended (relating to the investment of the unallocated interest fund); but the amount payable under this para-

graph shall not exceed the aggregate amount allocated to the trusts described in subsection (c) of section 26 of such Act; and

(14) To pay into the Treasury as miscellaneous receipts any funds remaining in the German special deposit account after the payments authorized by paragraphs (1) to (12) have been completed.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 561

STANDARD COMMERCIAL TOBACCO COMPANY and STANDARD COMMERCIAL STEAMSHIP CORP.,
Petitioners,

v.

JOHN W. SNYDER, Secretary of the Treasury, and UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 561

STANDARD COMMERCIAL TOBACCO COMPANY and STANDARD COMMERCIAL STEAMSHIP CORP.,
Petitioners,

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, and UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners and present this petition for a rehearing on the petition for a writ of certiorari filed in this case.

Jurisdiction

The petition for certiorari was filed on February 3, 1950, and denied on March 27, 1950. This petition for rehearing is filed within fifteen days from March 27, 1950, in accordance with Rule 33 of this Court.

Reasons for Petition for Rehearing

In applying for this rehearing, your petitioners reiterate each and every ground set forth in the original petition, and further suggest to the Court the matters hereinafter discussed.

This petition is made because the petitioner's reply brief was not completed until the very day on which the Court denied this application. The contents of the Reply Brief are printed at the end of this application for rehearing of the petition, exactly as the brief was about to be sent to the printer on March 27, 1950. The Clerk of the Court had been informed by telegram, immediately on receipt of the Respondents' Brief, of the intention to file a Reply Brief.

The necessity for the Reply Brief and its chief purpose was to bring to the attention of this Court the fact, which was not disclosed in either brief, before the Court, that *Williams* v. *Heard,* 140 U. S. 528, on which the Respondents appeared chiefly to rely, had been, in effect, nullified five years later by an act of Congress on February 27, 1896 (31 USCA 547). Both sides had cited the *Williams* case; the appellants, by inadvertence, had not referred to the subsequent statute, as they had alluded to the *Williams* case only as one of fifteen authorities (page 21 of the Petitioners' Brief) supporting the principle recognized by Chief Justice Marshall in the *Bank of United States* case (9 Wheat. 904) that the United States could be held to performance of the duties of a trustee. The Respondents cited the *Williams* case, twice on page 12 of their brief, as the controlling authority and nowhere made mention of the subsequent and countervailing statute of 1896.

Through the entire Federal judicature, the opinions announced in this case have totalled merely three sentences, yet it must be admitted that the case is of novel impression; that it involves upwards of $100,000,000 indisputably due to American citizens; that it brings before the Court historic and recent precedents in its own decisions and those of the English courts; that it calls for the first time for the construction by this Court of a far reaching statute of great and immediate importance, enacted in 1896, five years after the *Williams* case and, perhaps, as the result thereof; and presents for the first time the question of the reconciliation of the Federal Tort Claims Act (28 USC 921) and the Court of Claims Act, as amended June 25, 1948 (28 USCA 1491).

That these petitioners have suffered a wrong has been repeatedly and recently conceded by officials of the highest rank in the government of the United States, as shown in the appended proposed Reply Brief. There has been a wrong, there appears to be no remedy, in view of the denial of this petition, even though the United States has shed its robes of sovereignty and subjected itself to suit for any wrong "under circumstances where the United States, if a private person, would be liable." It would seem that in such circumstances an even higher duty rests upon the officials of government than on private counsel to aid in rectifying this wrong, and yet the Department of Justice has, before this Court, relied on the *Williams* case, without disclosing to the Court the subsequent action of the Congress as to the disposition of funds received from foreign governments for citizens of the United States.

In denying this petition, the Court has sanctioned the dismissal of the complaint with no opportunity to amend and has deprived the plaintiffs of any possibility of

presenting their evidence or curing any defect in the allegations of the complaint by supplying the proof of any missing essential of their causes of action. The Court has thereby answered in the negative these questions:

> Have these petitioners any remedy for the wrong done them?
>
> If they are not within the Federal Tort Claims Act, are they, by virture of statute (28 USCA 1346 and 1491), entitled to sue in the United States District Court and/or the Court of Claims under the fourth and fifth provisions for its jurisdiction —for money had and received for their benefit under the Act of February 27, 1886, clearly a cause of action "founded upon any express or implied contract with the United States" or "for liquidated or unliquidated damages in cases not sounding in tort"?

ARGUMENT

POINT I

Since the Treaty of Berlin the United States (by virtue of the Act of February 27, 1896 (31 USCA 547)), has held in trust all German assets delivered under it.

This legislation, enacted after the decision of this court in *Williams* v. *Heard,* on May 25, 1891, provides:

> "All moneys received by the United States from foreign governments and other sources in trust for citizens of the United States and others, shall be deposited and covered into the Treasury. * * * Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment of the ascertained beneficiaries thereof."

The language in the text of the act reads "*from foreign governments and other sources.*" Certainly it can not be argued that the seized German assets from the First World War were received for any other purpose, in view of the language of the Treaty of Berlin, the Debt Settlement Agreement and contemporary action by the Congress, particularly in view of the fact that it had been the traditional and avowed policy of this country from its inception not to confiscate private property as war booty. The words "other sources" are here too significant to be sloughed off. Concededly, the assets from the Second World War come from "other sources" for there is as yet no treaty and in fact no surviving German government to make one. We believe it absolutely sound, or at least sufficiently serious for this Court to hear argument thereon, for us to contend that with a half billion defaulted German bonds in the hands of the United States, held for the benefit of these awardholders, it follows as a matter of law that the German assets seized in the Second World War are funds "in trust for citizens of the United States."

POINT II

Petitioners believe they have the right to elect whether they would proceed (a) in equity for specific enforcement of the trustee's duties, as they have endeavored to do in their second prayer for relief; (b) under the Federal Tort Claims act for the conversion of trust funds held for their benefit as they do under their first prayer for relief; and as implied in the Respondent's Brief and the cases cited by them at page 16 (*Carl Byoir Associates* v. *Tsune-Chi*, 112 F. 2d 885, and *Parker State Bank* v. *Pennington*, 9 F. 2d 966) for money had and received, by virtue of the provision of the Act of April 27, 1896, aided by the practical construction placed upon it by the accounting methods adopted by the Secretary of the Treasury in the disposition of the funds resulting from the liquidation of the German assets and the recent action of the Congress in the War Claims Act (Chapter 826, 80th Cong., 2d Session), which retains in the Congress the control and disposition of the funds resulting from seizure during World War II and does not put them under the Act of February 27, 1896.

The foregoing two points, added to those set out in our petition for writ of certiorari and the briefs below, indicate the problems which have confronted counsel for the petitioners. To them it has seemed clear that these petitioners, clearly wronged as they are by act of the United States, have some right or rights and, believing that the ancient maxim—*ubi jus, ibi remedium*—has not become obsolete are convinced, through careful study, that these petitioners have available to them alternate causes of action, as to which the doctrine of election of

remedies does not apply; that they may sue both at law and in equity; *ex contractu* and *ex delicto;* under treaty and statutes of the United States; and that the complaint states good causes of action and should not be summarily dismissed without the plaintiffs being afforded a right to amend, if there has been an omission in their pleadings, as they would be in any ordinary case fraught with no such intricacies as is the instant action. We have faith that on re-consideration the Court will agree that this case merits a full hearing by the full court, and, on full presentation of the treaties, statutes and legal principles involved, that it should not be disposed of on a necessarily limited and inadequate presentation by petition for writ of certiorari on which counsel are inarticulate. Happily to two members of the Court this is not a new issue: the Chief Justice, then as Secretary of the Treasury, was cognizant of the origin of the action, and another, as Attorney General, of its initial defense.

Conclusion

For the foregoing reasons and those set forth in the following brief, the petitioners respectfully urge that a rehearing be granted; that upon further consideration that the order of March 27, 1950, denying the petition for certiorari be revoked, and that the writ of certiorari issue as prayed.

HAROLD G. ARON,
RAYMOND L. WISE,
RICHARD L. MERRICK,
Attorneys for Petitioners.

I, Harold G. Aron, of counsel for petitioners, Standard Commercial Tobacco Company and Standard Commercial Steamship Corp., do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

HAROLD G. ARON,
Of Counsel for Petitioners.

PROPOSED REPLY BRIEF FOR APPELLANTS

The sole purpose of this brief is to answer three statements made in Respondents' brief.

Pages 2 and 14: The only provision the Congress has made as to enemy property, seized during the Second World War, is contained in Sec. 13 (a) of the War Claims Act (Chapter 826, 80th Cong., 2d Sess.) which reads as follows:

> WAR CLAIMS FUND
>
> SEC. 13. (a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the War Claims Fund. The War Claims Fund shall consist of all sums covered into the Treasury pursuant to the provisions of section 39 of the Trading With the Enemy Act of October 6, 1917, as amended. The moneys in such fund shall be available for expenditure only as provided in this Act or as may be provided hereafter by the Congress.

Due to the amounts of property seized during the Second World War, this does not appear to impinge on the rights of the petitioners, now here; were it found to do so, the constitutionality of the Act would be attacked on the ground that the Congress was without power to make any disposition of the enemy property seized during the Second World War, except subject to the trust with which it was impressed in favor of these petitioners and others similarly situated, because of the default in the German bonds held for their benefit.

Page 12: Williams *v.* Heard, 140 U.S. 529, does not conflict with the petitioners' position; if it is to be cited against them, then some reference should have been made

by Respondent to the fact that it was decided in 1891 and was directly affected by act of Congress on February 27, 1896 (31 USCA 547) and also to Administrative Decision No. V (Parker, Umpire) of the Mixed Claims Commission, United States and Germany.

Page 13: The trust *res*, as here referred to, had no such origin as is stated by respondent. Historically, as far as these awardholders are affected, the *res* originated on August 21, 1921, in the Treaty of Berlin which embodied the provisions of the earlier Treaty of Versailles (Art. 297), and has been so regarded since that time. (Messages of Calvin Coolidge as President of the United States of December 6 and 7, 1926, Sen. Doc. No. 99, 69th Congress, page 2; H. Doc. 483, 69th Congress, p. 16; Report of the Secretary of the Treasury for 1928, page 356; Communication of Charles Evans Hughes as Secretary of State on hearing before Ways and Means Committee of the House of Representatives, 69th Congress, November 19, 1926, page 253; statement of Andrew W. Mellon as Secretary of the Treasury on hearings before sub-committee on Ways and Means, HR 10820, 69th Congress; Secretary of the Treasury, Sen. Doc. No. 99, 69th Congress, page 2; Report of Secretary of the Treasury for 1928, page 356; statement of Mr. Bankhead on H.R. 7201 Cong. Record, Vol. 69, Part 1, 70th Congress, 1st session, page 897; President Truman, Cong. Record App. August 12, 1947, p. A 5252.)

It is not necessary, under the present complaints, however, to go back to these early origins or further than the Settlement of War Claims Act of 1928, when the United States, as it was under the compulsion of doing by the paramount law of the Treaty of Berlin, affirmed its duties as trustee for the awardholders and committed the great blunder and breach of faith, while the claims of its own nationals were still in litigation before a tribunal which

it had itself created (Executive Agreement August 10, 1922 (42 Stat. 2200)), of releasing 80% of the German assets held in trust for American nationals, under the Treaty of Berlin, and substituting therefor the since proved worthless unsecured bonds of the German Reich, as guarantee of the payment of awards (the amount of which was not then known) which the United States had bound itself to collect as trustee for present and then future awardholders. The United States let those bonds go to default in 1931, not only without action on its part but with its passive acquiescence, and piled Ossa on Pelion by continuing until the passage of the Harrison Resolution three years later (48 Stat. 1277) to pay out millions of dollars to German nationals, while its own nationals received nothing. Then, through seizure of enemy assets in the Second World War, having become possessed of outright ownership, without cost to itself, of a vast amount of assets of Germany, the defaulting debtor, the United States converted these assets to its own use (see paragraph 6, pages 30, 31 of Transcript of Record in this Court) and here denies, and by every artifice of specious argument and misleading citation, seeks to evade any liability to these awardholders.

Is it to over-simplify, to use this illustration: If Smith owed Brown One hundred Dollars and gave him a note for it and Brown gave the note to Black who agreed to collect it; later Black turned up with the past due note unpaid but also in personal possession and ownership, without cost to himself, of Five hundred dollars worth of Smith's assets, does it need argument to show that no civilized tribunal would permit Black to keep for himself Smith's assets and apply no part of them to the note Smith had given Brown and Brown had in turn delivered to Black under Black's agreement to collect it?

Page 16: The Respondents grasp at a straw in contending that the Settlement of War Claims Act was an amendment to the Trading with the Enemy Act of 1917 and, hence, subject to the exception as to the latter act, set forth in Sec. 4?1 (e) of the Federal Tort Claims Act. But were this a fair and defensible construction of the last named act, it does not affect the case now here.

There are only two references in the complaints to the Settlement of War Claims Act in Paragraph 16, it is stated that by virtue of the Settlement of War Claims Act, the United States "had and claims to have no interest except as trustee" in the German bonds or the proceeds thereof, "for the sole and exclusive benefit of the holders of awards of the Mixed Claims Commission, United States and Germany." The only other reference is in the first prayer for relief "in such amounts as are respectively due them on awards of the Mixed Claims Commission, United States and Germany under the Settlement of War Claims Act." *By no conceivable distortion of the allegations of these complaints can it be argued that the petitioners are claiming under the Settlement of War Claims Act.*

To restate succinctly the position of the petitioners, it is this:

> By the Treaty of Berlin, Germany relinquished any claim on behalf of its nationals to a huge amount of seized enemy property for the declared purpose of paying the private war losses of American nationals and the United States received and accepted it for that express purpose. The United States diverted over 80% of this property to other uses and in December 1948 there was none left to pay approximately $100,000,000 still due on legal awards to American nationals. In the interval, the United States had become vested with another huge amount of German property as the result of

the Second World War. These petitioners in 1947, having foreseen the inevitable result, as to World War I German assets, which was demonstrated in fact at the end of 1948, began this action to impress a trust on the property of Germany seized in World War II, before any use or disposition had been made of it and before any other claims, legal or equitable, existed or were asserted against it.

Two causes of complaint were stated, with a single objective but with alternative relief asked: either that, to the extent necessary to make whole these petitioners and other holders of awards, the United States pay off the German bonds out of the German assets in its possession; or, if it failed in that duty, that the United States respond as woud any private trustee for the violation of the trust for these awardholders.

The legal philosophy of the petitioners' prayer is indicated in two cases, not cited as here factually in point, but for their learned opinions, both of which cases have been before this court.

Bradford (also cited as *Berger*) v. *Chase National Bank of the City of New York,* 24 Fed. Supp. 28; 309 U. S. 632, 84 L. Ed. 990;

Hartford Accident and Indemnity Company v. *Petroleum Royalties Company of Oklahoma, et al.,* 24 Fed. Supp. 759; 308 U. S. 626, 84 L. Ed. 522.

In the former, the late Judge Woolsey wrote:

"The basis of constructive trusts, such as the plaintiffs seek, is knowledge of wrongdoing. This knowledge may be inherent in the situation as in cases of constructive trusts imposed on malefactors or it may be based on notice, as where a party has

received a res innocently, and, after notice, refuses to return it or make restitution for it.

"Put at their highest for the plaintiffs, these causes are of the latter kind, and, assuming all the plaintiffs' contentions herein, nothing occurred to make it against conscience for the Philippine Government to take the bonds voluntarily turned over to it as pledges by their owners, or to sell them in due course with the consent of their owners so as to liquidate those pledges, and thereafter to deposit the proceeds of such liquidation in a bank of deposit and to use the proceeds in the ordinary course of its business, until it received notice from the several plaintiffs of their claims for restitution. In causes of this kind it is only retention after notice which would constitute a wrong in equity. Adams *v.* Champion, 294 U. S. 231, 236, 55 S. Ct. 399, 401, 79 L. Ed. 880; Holley *v.* Missionary Society, 180 U. S. 284, 290, 21 S. Ct. 395, 45 L. Ed. 531."

In the latter, the opinion reads in part:

"Constructive trusts are children of equity and they are recognized by all the courts, as evidenced by the many authorities quoted by the defendants. I am convinced, therefore, that the corporation was by the District Court, in its decision, supra, created as a constructive trustee for the trust estate and was as said in Rollow *v.* Taylor, 104 Okl. 275, 231 P. 224, syllabi 1 and 2:

'Trusts are children of equity, and equity delights especially, when the case has a flavor of fraud, in protecting trusts and in obliging trustees and trust estates to render to all men their dues.

'"Constructive trusts" are such as raised by equity in respect of property which has been acquired by fraud, or where, though acquired without fraud, it is against equity that it should be retained by him who holds it.'"